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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

DANIEL NAVARRO, et al., Plaintiffs, Appellants and Cross-Respondents, v. TRANSPORTATION INSURANCE COMPANY, Defendant, Respondent and Cross-Appellant.	B154205 (Los Angeles County Super. Ct. No. YC037804)

APPEAL from a judgment of the Superior Court of Los Angeles County. William G. Willet, Judge. Affirmed in part, reversed in part and remanded.

Keller, Price & Moorehead and Jeffery C. Sparks for Plaintiffs, Appellants and Cross-Respondents.

Horvitz & Levy, Peter Abrahams and Julie L. Woods; Cannon & Nelms, Anthony Cannon and Derrick R. Strum for Defendant and Respondent and Cross-Appellant.

The appeal and cross-appeal arise out of a complaint Daniel Navarro and his concrete pumping construction company, D&N Concrete (collectively "D&N") filed against Transport Insurance Company (TIC) and the insurance brokers[1] who sold D&N various insurance policies for D&N's business. D&N asserted causes of action, including, bad faith, breach of contract and negligence in connection with TIC's sale of the policies and the subsequent adjustment of a first party coverage claim after a D&N Mack truck and the attached concrete pump overturned on a job site. After a trial, the jury awarded D&N approximately $157,000. TIC filed post-trial motions for a JNOV and a new trial. The court granted a partial JNOV on the breach of contract claim, finding the damage to the Mack truck was excluded under the business auto policy. The court also granted a partial new trial on damages awarded on the bad faith and breach of contract claims finding the awards were excessive.

On appeal, D&N asserts the court erred in: (1) granting the JNOV; (2) granting the partial new trial motions; and (3) precluding D&N from seeking attorney fees in connection with the bad faith claim. In its cross-appeal, TIC argues, among numerous contentions: (1) the court should have granted a new trial on all issues because the court allowed D&N to present improper expert testimony; and (2) a JNOV was also warranted on D&N's claim for breach of contract with respect to payments made to a third party. As set forth below, the court properly granted the JNOV as to the breach of contract claim on the Mack Truck and the court should have granted a JNOV on the third-party claim. In addition, we find a new trial is warranted on the remaining claims because the court admitted prejudicial expert testimony, which not only usurped the authority of the jury but also invaded the province of the court. Accordingly, we affirm in part, reverse in part and remand for further proceedings.

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[1] The insurance brokerage firm, Wood-Gutmann, settled with Navarro and is not a party to the appeal or cross-appeal.

FACTUAL AND PROCEDURAL HISTORY

D&N's Business and Insurance Policies. D&N is a concrete pumping contractor that works on commercial construction projects by moving concrete from mixing trucks to the job sites through the use of a pump.

In the mid-1990s, Navarro met Kevin Bogart, a principal in Wood-Gutmann Insurance Brokers at a concrete pumping association function. According to Navarro, Bogart held himself out as an expert in the insurance requirements for concrete pumpers.

In discussing insurance for D&N with Bogart, Navarro requested "actual cash value" coverage for his equipment. Navarro wanted property damage insurance so that in the event his equipment was destroyed or damaged he could have it replaced. From 1996 to 1998, Bogart sold D&N insurance policies for the business (i.e., commercial property, general commercial liability, business auto and inland marine insurance[2]). Contractors Bonding and Insurance Company (CBIC) issued the policies.

In 1998 when it was time to renew D&N's policies, in addition to offering the CBIC policies, Bogart also presented an insurance proposal from two other insurance companies including CNA Insurance. According to Bogart, CBIC was no longer going to issue certain liability coverage certificates D&N needed to perform its work and thus, D&N needed to consider other options for its insurance needs. Bogart's insurance proposal indicated CNA policies provided actual cash value coverage for the equipment in the event of loss. According to Navarro, Bogart represented that all three insurance carriers provided the same coverage at comparable prices.

Pursuant to an agency agreement with CNA, Wood-Gutmann had authority to bind insurance coverage on CNA's behalf. At the time Bogart provided the insurance proposals, however, Navarro was unaware that Bogart's firm Wood-Gutmann, also had an incentive program with CNA, pursuant to which brokers in the firm would received

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[2] Inland marine insurances provides coverage for mobile property and equipment.

additional commissions from CNA at the end of the year if they "rolled" over a large number of policies from other insurers to CNA. According to Bogart, Wood-Gutmann had a similar arrangement with CBIC.

D&N purchased the CNA package of insurance. TIC (part of the CNA Insurance Group) issued the commercial property, general commercial liability, business auto and inland marine insurance policies to D&N for the August 1998 through August 1999 time period.

Specifically, the inland marine insurance (IMI) policy provided coverage for D&N's mobile equipment with a "stated item policy limit," which limited the amount of coverage for any item of equipment to the monetary amount listed for that item on the equipment schedule. (Exh. 106—The declaration page states the policy provides "scheduled" coverage, meaning the "limit of insurance for any one item will not exceed the amount shown [or scheduled for that item] in the itemized list."). It also provided for actual cash value coverage up to the policy limits [stated for each item] for damaged equipment that could not be repaired, or replaced. The policy further provided a catastrophic limit of $3.7 million as of June 1999.

D&N's Addition of the Mack Truck/Tractor and Concrete Pump to the Policy. In May 1999, D&N purchased a new 52-Meter Putzmeister Concrete Pump (on a trailer) (the Pump) and a 1999 Mack Truck/Tractor (the Mack Truck) to pull the Pump. D&N paid $770,000 for the Pump and $71,000 for the Mack Truck, plus sales tax.

Navarro sent a fax to Wood-Gutmann indicating he had purchased the Pump and the Mack Truck. At the time he estimated the value of the equipment at $750,000 for the Pump and $75,000 for the Mack Truck. Navarro claims when he made these estimates he was unaware they would be used to establish the "stated item policy limit" for this equipment.

Based on this information, the Pump and the Mack Truck were added to the contractor's equipment scheduled of the IMI policy for $825,000. According, to the CNA underwriter and Bogart, the Pump and Mack truck were insured together as one

unit under the property damage provisions of IMI policy as demonstrated by the declaration page of the policy. Notwithstanding the general exclusion under IMI for automobiles, Bogart claimed the Pump and the Mack Truck were considered so intermingled that they were difficult to separate and were thus treated as a single unit for the purposes of property damage coverage under the IMI policy pursuant to industry practice. Nonetheless, public liability coverage for the Mack Truck was provided under the business auto policy.

The Claim and Adjustment. On June 8, 1999, while working on a job site (a hospital in Orange County) operator error caused the Pump and Mack Truck to tip over. According to Navarro, when he informed Bogart of the accident, Bogart told him he would be reimbursed for all costs associated with the accident including costs of clean-up and damage to the site.

Pierto Construction (the contractor who had hired D&N for the project) assisted in the repair of the damage and clean up after the accident and submitted a bill to D&N for $8,493 ("Pierto Claim"). In addition, D&N paid $165 to have a car washed that had been splattered with concrete as a result of the accident ("Car Spa Claim").

On June 11, 1999, TIC assigned Mike Herman to inspect the damage and serve as the adjuster on the first party property damage claim. Thereafter on June 14, 1999, Herman inspected the damaged equipment. Herman told Navarro he would recommend the Pump be treated as a total loss.

In July 1999, Navarro informed Herman that he had incurred other expenses associated with accident, including the Pierto Claim. Herman told Navarro he would be reimbursed for it. In August 1999 Herman informed Bogart that some of the loss payments, including the Pierto Claim and the Car Spa Claim would be paid under the liability insurance policies.[3]

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[3] Navarro paid the Pietro Claim in December 1999.

According to Navarro, shortly after the accident Herman determined that the loss to the Pump alone exceeded the $825,000 limits under the IMI policy and that neither Herman nor Bogart informed him he was underinsured at that time. On the contrary, Navarro claims Bogart and Herman led him to believe that he had full coverage for the loss.

Based on the conclusion that the Pump was a total loss and thinking his insurance would cover the entire loss, D&N ordered another Putzmeister Pump.[4]

As for the Mack Truck, Herman recommended it be repaired based on the actual cash value of the truck of $70,000 before the loss and an estimated repair costs at approximately $35,000. According to Navarro, Herman told him to send the Mack Truck to a CNA preferred repair facility, which was not authorized by Mack.[5] The repairs to the Mack Truck ultimately cost approximately $50,000. At trial Navarro claimed that after the repair, the Mack Truck was worth less than $30,000.

In mid-September, Herman informed D&N that the loss for the Pump exceeded the $825,000 policy limits (for the Pump and the Mack Truck). The statement of loss showed a primary loss of $883,430, which included the estimated costs of repairs for the Mack Truck, replacement of the Pump and sales tax. In October 1999, TIC paid $848,555 for the loss ($825,000 on the IMI policy and $23,555 in incidental expenses). Because the policy limits exceed the amount of the loss, D&N paid the full cost of repairs for the Mack Truck.

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[4] Navarro paid $770,000 (plus sales tax) for the new pump and as he had with the first pump, he financed the purchase. Through the summer of 1999, Herman arranged a collateral transfer agreement with D&N's lender pursuant to which the new pump would be substituted as collateral for the original pump on the original loan. Among other things, the collateral transfer allowed TIC to obtain the salvage rights on the original pump.

[5] At trial Herman denied he instructed Navarro to use a particular repair facility.

The Litigation. D&N filed the instant action asserting causes of action for breach of the covenant of good faith and fair dealing ("bad faith") and negligence against TIC[6] as well as causes of action for fraud, negligent misrepresentation and professional negligence against Wood-Gutmann.

D&N also sought attorney fees in connection with its bad faith claim. During discovery, TIC sought production of records and other documents concerning attorney fees D&N had paid in connection with its efforts to obtain payment on it policies. D&N refused to produce the records contending they were protected from discovery by the attorney-client privilege.[7]

Wood-Gutmann settled with D&N shortly before trial for $45,000.

The case proceeded to trial against TIC on the theories TIC was vicariously liable for the negligence of Wood-Gutmann[8] and TIC engaged in bad faith in adjusting the claim. During the trial, over the objections of TIC, D&N was allowed to present expert testimony on the issue of bad faith and negligence. The bad faith expert Alan Hamilton was allowed to opine that TIC breached the covenant of good faith and fair dealing and violated various insurance regulations in adjusting the claim. The negligence expert, Richard Masters, testified that Wood-Gutmann's conduct fell below the standard of care for professional insurance adjustors and that because Bogart held himself out as an insurance expert, he had a higher duty of care which could be imputed to TIC as their agent. In addition, both experts were allowed to interpret and explain the meaning of the

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6 CNA was later added as a defendant in the action, but was subsequently dismissed by the court.

7 The court subsequently precluded D&N from introducing evidence concerning its attorney fees, finding that D&N's failure to disclose its records during discovery resulted in a waiver of the right to seek the fees and that D&N had failed to comply with local court rules in attempting to present the fees evidence.

8 In connection with its ruling on TIC's summary judgment motion, the court precluded D&N from proceeding against TIC on a theory of direct negligence.

insurance contracts at issue. Both opined that based on their construction of the contracts, the Mack Truck could have been adjusted (and additional benefits paid) under the business auto policy and that contract benefits were still owed under the general liability policy for the Car Spa and the Pierto Claim.

Before the case was submitted to the jury, the court allowed D&N to amend the complaint to assert a cause of action for breach of contract. The contract claim was expressly limited to D&N's claim it was entitled to benefits: (1) under the commercial liability policy for damages D&N incurred in paying the Car Spa Claim and Pierto Claim; and (2) under the business auto policy for damages to the Mack Truck.

At the close of the trial, in connection with instructing the jury, the court told the jury that it should disregard the portion of Alan Hamilton's expert opinion that TIC breached the covenant of good faith and fair dealing. Thereafter, notwithstanding TIC's objection, the court instructed the jury on (in addition to the other causes of action) a claim that TIC was liable for Wood-Gutmann's "professional negligence."

The jury returned a verdict for D&N for $66,000[9] on the negligence claim, $8,567 for bad faith and $90,000 on the breach of contract cause of action.

Post-Trial Motions. TIC filed a motion for a JNOV. TIC asserted, inter alia, it was entitled to judgment on the breach of contract cause of action. First, TIC maintained the Mack Truck was not covered under the business auto policy and thus TIC did not breach the contract for failing to pay benefits for the Mack Truck under the policy. Similarly, TIC contended the Car Spa and the Pierto Claim were also not payable to D&N because they were excluded under the relevant policies.

The court granted the JNOV with respect to the breach of contract on the Mack Truck, finding the auto policy did not provide coverage for the truck. The court, however, denied the JNOV on the other claims. Concerning the Car Spa and the Pierto

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[9] The jury also found D&N was 10 percent at fault on the negligence claim.

Claim the court concluded Bogart's representation that the claims would be paid created coverage and liability under a breach of contract theory.

TIC also filed a new trial motion, asserting among other claims that the damages were excessive and the court made various errors in admitting the expert testimony and instructing the jury.

The court denied a new trial on the negligence claim, but granted a conditional[10] new trial for damages for breach of contract and bad faith. The court concluded the damages on the breach of contract were excessive and initially the court ruled the damages for bad faith were inadequate.[11] The court ordered that in connection with the new trial, discovery would be re-opened to allow D&N to present evidence of its attorney fees incurred on the bad faith claim.

Both D&N and TIC timely appeal.

Issues Presented To This Court

D&N raises the following matters in the appellant's brief:

1. The court erred in granting the JNOV on the breach of contract claim concerning the Mack Truck because the evidence presented at trial supported a finding that the business auto policy provided property damage coverage for the Mack Truck.

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[10] The court indicated that if D&N would consent to a reduction of the breach of contract damages to $8,567, the court would deny the new trial motion on that claim. The court also stated it would deny the new trial motion on the bad faith claim if TIC agreed to allow the court to re-determine the amount of damages on the claim. Neither TIC nor D&N agreed to the conditions.

[11] A subsequent court order attempted to clarify the basis for the new trial on bad faith damages by indicating that a new trial was appropriate because TIC had argued the damages were excessive.

2. The court should not have granted a new trial on bad faith and contract damages because when the damages awarded on each claim are considered together they are not excessive.
3. D&N should have been permitted to present its attorney fees evidence.

On the cross-appeal, TIC asserts the following claims of error:

1. The court should have granted a JNOV on the contract action concerning the Pierto Claim because it falls within an exclusion to the general liability policy.
2. The court should have granted a new trial on all of the remaining issues because of improper and prejudicial expert opinion testimony.
3. TIC also raises several contentions in the alternative, in the event this court does not order a new trial on all causes of action. These contentions include:
    (a) A new trial is warranted on negligence because the court gave erroneous instructions on professional negligence and the damages awarded were excessive.
    (b) The new trial order on bad faith cannot stand because the court lacked jurisdiction to grant it and the stated reason for the order is improper.
    (c) The court erred in limiting the scope of discovery on re-trial.
    (d) The damages awarded on the breach of contract, if the verdict is re-instated, are excessive.
    (e) TIC is entitled to an offset in the amount of the settlement between D&N and Wood-Gutmann.[12]

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[12] Both parties concur TIC is entitled to an offset in the amount of the Wood-Gutmann settlement. Given the trial court reserved jurisdiction on this issue and that this matter will be returned for a new trial, this court need not address the offset.

To assist in the analysis and resolution of these contentions, we discuss the issues and arguments in the appeal and the cross-appeal together and organize the discussion of the issues as they were presented in the post-judgment motions.

DISCUSSION

I. The JNOV Motion

A. Standard of Review

Preliminarily we observe the trial court has the inherent power to grant a partial judgment notwithstanding the verdict (JNOV); the court may grant a JNOV as to some issues in the action while denying it as to others. (*Beavers v. Allstate Insurance Company* (1990) 225 Cal.App.3d 310, 323.)

In reviewing an order denying or granting a JNOV, this court will ordinarily view the evidence in the light most favorable to the jury's verdict and consider whether there is any substantial evidence, contradicted or uncontradicted to support it. (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 284 [review of order granting JNOV]; *Shapiro v. Prudential Property and* Casualty (1997) 52 Cal.App.4th 722, 730 [denial of JNOV].) If, however, the issues presented in the JNOV involved only legal issues such as the application of undisputed facts or the interpretation of a statute or contract, then this court reviews such matters de novo. (See *Trujillo v. North County Transit Dist.*, *supra*, 63 Cal.App.4th at p. 284.)

With these principles in mind, we turn to the contentions raised by the parties, namely, whether the court properly granted a JNOV on the breach of contract claim concerning the Mack Truck, and secondly, whether the court erred in denying the JNOV on the contract cause of action for the Pierto Claim.

B. The Mack Truck.

The court allowed D&N to amend the complaint to assert a breach of contract claim on business automobile policy. Specifically, D&N asserted the auto policy provided property/physical damage (i.e., collision and comprehensive) coverage for the Mack Truck and thus, TIC breached the auto policy when it failed to pay D&N benefits for the damage to the Mack Truck. The trial court granted the JNOV on this claim, finding the auto policy did not provide coverage for the Mack Truck. In our view, the court properly interpreted the policy.

Interpretation of an insurance contract is generally a question of law governed by ordinary rules of contract interpretation. (*Fidelity & Deposit Company of Md. v. Charter Oak Fire Insurance Co.* (1998) 66 Cal.App.4th 1080, 1086, 1087-1088.) The contract is construed to give effect to the intention of the parties as expressed by the language of the policy. To the extent that the language is explicit and clear, the language of the contract controls and extrinsic evidence is not considered. (*Id.* at p. 1088.)

Here pursuant to the unambiguous language of the auto policy, coverage for a particular vehicle is demonstrated by whether a premium is paid for the type of coverage listed for that vehicle. Under the policy *only some* of D&N's vehicles were insured for comprehensive and collision coverage while other vehicles had coverage limited to public liability and uninsured motorist claims. The policy indicates D&N paid a premium to cover the Mack Truck for public liability and uninsured motorist coverage *only*. Consequently, the auto policy did not provide comprehensive and collision coverage for the damage to the Mack Truck.

Contrary to D&N's contention, there is no other provision in the policy that might create coverage. Below the court allowed D&N's expert, Alan Hamilton to interpret the auto policy and thus testify the "after acquired vehicle provision" in the auto policy would create coverage. Pursuant to that provision, a vehicle acquired after the policy begins, like the Mack Truck, is automatically covered by the policy. This provision,

however, would have provided automatic comprehensive and collision coverage under two circumstances: (1) if *all* of D&N's autos had the comprehensive and collision coverage; or (2) where the Mack Truck had replaced a vehicle, which carried that coverage. Neither of these conditions were present, and thus the "after acquired auto" provision does not assist D&N.

In addition, we are not persuaded by D&N's assertion on appeal that the Mack Truck must be insured for comprehensive and collision coverage under the auto policy because it was excluded from such coverage under the IMI policy. Whether or not the Mack Truck was covered under the IMI policy, is irrelevant to the ruling on JNOV. The propriety of the JNOV depends only on whether coverage was provided under the auto policy because the breach of contract claim was expressly limited to coverage for the Mack Truck under that policy.

In any event, the uncontroverted evidence presented at trial demonstrated the Mack Truck was insured for property damage (together with the Pump) under the IMI policy. The Mack Truck was covered under the IMI policy, notwithstanding a boilerplate exclusion in the policy for such autos, based on an underwriting decision CNA and an industry practice to insure such vehicles together with the attached equipment as one unit. The declaration page of the policy shows the coverage for the Mack Truck under the IMI policy and as such controls over the exclusion in the pre-printed policy list of exclusions.[13] (*Fidelity & Deposit Company of Md. v. Charter Oak Fire Insurance Co.*, *supra*, 66 Cal.App.4th at p. 1087 ["When the information in the declarations conflicts with general information in the preprinted forms, the former prevails over the later"].)

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[13] We note D&N's allegation the declarations were "issued" after the loss during the litigation and thus should not control the analysis. Nonetheless, it appears from a review of the entire record, that while the declaration pages presented at trial and entered into evidence were *printed* after the loss, the coverages they describe existed before the accident.

D&N's only other argument the Mack Truck was insured under the auto policy for property/physical damages is its claim that Navarro intended to obtain such coverage. In connection with TIC's summary judgment motion, Navarro provided a declaration in which he stated he told a Wood-Gutmann employee to insure the Mack Truck under the auto policy. Navarro, however, did not reiterate this statement at trial. But even if he had, it would not have mattered because the Mack Truck was insured under the auto policy for public liability and uninsured motorist coverage only. Moreover, Navarro's alleged conversation with a Wood-Gutmann employee is merely extrinsic evidence of intent, which does not alter the interpretation of the otherwise unambiguous language of the policy.

In view of the foregoing, we conclude the court properly granted the JNOV on the breach of contract claim for the Mack Truck.

C. Pierto Claim.

The trial court allowed D&N to amend the complaint to assert a breach of contract cause of action under the general commercial liability policy for TIC's failure to pay the Pierto Claim and Car Spa Claim. In TIC's motion for a JNOV, it asserted it did not breach the contract because these claims were excluded under the general commercial liability policy. In denying the JNOV, the court did not consider the policy exclusion, and instead concluded the judgment was justified based on "representations" of Bogart to Navarro that these claims would be paid under the policies.

On appeal, TIC asserts the court should have ruled on the policy exclusion and having properly done so it would have granted the JNOV on the breach of contract for the Pierto Claim.[14] We agree.

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[14] On appeal, TIC does not challenge the trial court's denial of the JNOV with respect to the Car Spa Claim.

The Pierto Claim sought recovery of costs and expenses associated with damage to and repair of a streetlight and asphalt, as well as an oil spill, which resulted from the accident. The policy at issue, the general commercial liability policy contains a policy exclusion for damage to real property as a result of the insured doing its work on the property. The uncontroverted evidence presented at trial demonstrated the damages sought in the Pierto Claim occurred on the real property during D&N's performance of its work. Thus, the Pierto Claim falls within exclusion in the general commercial liability policy.

D&N responds the damage was covered and payable under the public liability coverage in the *business auto policy*. We do not reach the merits of this assertion on appeal because D&N did not make this claim in the trial court. D&N's only position at trial, as espoused by its expert's construction of the contract, was that the Pierto Claim was covered under the general commercial liability policy. Furthermore, the contract cause of action for this damage was *limited* to an alleged breach of the general commercial liability policy.

Finally, the court's analysis, which focused entirely on the *oral representation* of coverage, does not sustain the ruling on the JNOV, absent a showing that TIC waived the policy exclusion or the existence of a claim for promissory estoppel. Here and below, D&N never asserted a policy waiver or any other equitable theory such as estoppel.

We also observe that while an agent's representation or misrepresentation concerning the scope of insurance coverage may under some circumstances give rise to liability of the insurer, the appropriate legal theories to obtain recovery are negligent misrepresentation, fraud or contract reformation. (See e.g., *Butcher v. Truck Insurance Exchange* (2000) 77 Cal.App.4th 1442, 1465 [agent misrepresented a certain claim was covered under the policy, notwithstanding express policy exclusion; after insurer denied coverage, court allowed plaintiff to proceed against insurer under theories of negligent misrepresentation, negligence, reformation and breach of contract to procure insurance]; *Clement v. Smith* (1993) 16 Cal.App.4th 39, 44-45 [damage award against insurer

sustained on a theory of negligent misrepresentation where agent misrepresented scope of insurance coverage both before claim arose and afterwards].) During the trial D&N proceeded on a straightforward breach of contract theory—that is, the Pierto Claim was covered under the general commercial liability policy and that TIC breached the contract when it failed to pay the claim. Thus, the oral representations concerning coverage are not relevant to this particular cause of action. Any damage D&N suffered as a result of the Pierto Claim and the representations it would be paid are more appropriately remedied under D&N's other causes of action.

Accordingly, we conclude the trial court erred in failing to grant the JNOV on the breach of contract for the Pierto Claim.

II. The New Trial Motion

A. Standard of Review

"'[A]lthough the trial court is "is accorded a wide discretion in ruling on a motion for a for new trial and ... the exercise of this discretion is given great deference on appeal ... we are also mindful of the rule that on an appeal from the judgment it is our duty to review all rulings and proceedings involving the merits or affecting the judgment as substantially affecting the rights of a party ... including an order denying a new trial. In our review of such order denying a new trial, as distinguished from an order granting a new trial, we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial. [Citations.]" [Citations.]' [Citation.]" (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 969.)

On appeal, TIC asserts the court erred in failing to grant a new trial on all of the claims in view of the admission of improper, irrelevant and prejudicial expert opinion evidence. Although the trial court has discretion in deciding to admit expert opinion

evidence, the discretion is not absolute. (*Summers v. A.L. Gilbert Co*. (1999) 69 Cal.App.4th 1155, 1169.) Thus, this court considers whether the trial court's ruling "exceeded the bounds of reason." (*Piscitelli v. Friedenberg, supra,* 87 Cal.App.4th at p. 972.) As we shall explain, our review of the record convinces us the court erred in admitting certain opinions offered by D&N's experts.

B. Admission of Expert Testimony

In deciding whether to admit expert evidence, the court should consider whether the proffered evidence is relevant and material, whether a proper foundation has been laid and whether it is within the proper scope of expert opinion. (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.)

"As a general rule, the opinion of an expert is admissible when it is '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact ....' (Evid. Code, § 801, subd. (a).) Additionally, in California, '[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact.' (Evid. Code, § 805.) However, the admissibility of opinion evidence that embraces an ultimate issue in a case does not bestow upon an expert carte blanche to express any opinion he or she wishes. [Citation.]" (*Summers v. A.L. Gilbert Co*., *supra*, 69 Cal.App.4th at p. 1178.) "There are limits to expert testimony, not the least of which is the prohibition against admission of an expert's opinion on a question of law." (*Ibid.*)

Moreover, the *Summers* court held that even if an expert opinion does not embrace an issue of law, it is not admissible if it invades the province of the jury to decide a case. "'Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided .... There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for the decision to the witnesses; and in any event it is

wholly without value to the trier of fact in reaching a decision.' " (*Summers*, *supra*, 69 Cal.App.4th at pp. 1182-1183; citing 1 McCormick on Evidence (4th ed. 1992) § 12, p. 47, fn. omitted.)

Below, over TIC's objections, D&N's insurance industry experts, Hamilton, and Masters offered opinions relating to the breach of contract, bad faith and negligence claims against TIC.

1. Breach of Contract[15]

Both Hamilton and Masters opined insurance coverage for the Car Spa claim existed under the policies issued to D&N, that benefits were still owed under the policy and should have been paid on the claim. TIC complains this testimony constituted an improper legal opinion and invaded the province of the court and the jury. TIC is correct.

In admitting this testimony, the court allowed these experts, in essence, to interpret the meaning of the insurance policies and declare the contracts had been breached. The interpretation of an insurance policy, however, is clearly a question of law "about which expert opinion testimony is inappropriate." (*Cooper Companies, Inc. v. Transcontinental Insurance Company* (1995) 31 Cal.App.4th 1094, 1100.) Furthermore, construction of an insurance contract is a judicial function. (*Ibid.*) Experts may not give opinions on matters that are essentially within the province of the court to decide. (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 884.)

The expert opinions in this case also usurped the function of the jury to decide whether TIC had breached the contract. "The manner in which the law should apply to particular facts is . . . not subject to expert opinion. . . . [¶] While in many cases expert opinions that are genuinely needed may happen to embrace the ultimate issue of fact . . . the calling of . . . 'expert witnesses' to give opinions as to the application of the law to

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15 Our analysis on the breach of contract issue relates to the only claim that survived the JNOV, that is, the Car Spa Claim.

particular facts usurps the duty of the trial court to instruct the jury on the law as applicable to the facts . . . ." (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841-842.) Moreover, expert opinions that invade the function of the jury are excluded "because they are not helpful (or perhaps too helpful) . . . [w]hen an expert's opinion amounts to nothing more than an expression of his or her belief on how the case should be decided, it does not *aid* the jurors, it *supplants* them." (*Summers*, *supra*, 69 Cal.App.4th at pp. 1182-1183; original emphasis.) Here, in reaching the verdict on the breach of contract claim, the jury was left only the ministerial task of filling in the amount of damages.

Thus, we conclude the court erred in admitting expert opinion on the breach of contract claim. The issue remains, however, whether admission of this evidence was prejudicial.

The court instructed the jury that it was not bound by the expert opinions, and that it should consider the facts and materials upon which the opinion is based in deciding whether to accept the expert opinion. However, no one else during the trial, other than D&N's experts, provided any guidance to the jury on these issues. The court never interpreted the contract and TIC did not attempt to offer a competing expert to construe the contracts. Thus, the jury was left with the general and conclusory[16] legal opinions of D&N's experts that coverage existed and the contract had been breached. Of course, the policies themselves were admitted into evidence, but they consist of hundreds of pages of complicated insurance terminology. In our view, it is highly unlikely a lay jury could have or would have combed through the thick pile of policies with detailed, boilerplate coverage provisions to locate the source of the expert opinions and to test them for accuracy against the language in the documents. There was a real danger that in this case, in the absence of an interpretation by the trial court, the jury simply adopted the views of the experts on the meaning of the contract and whether it had been breached. Thus, we cannot say it was unlikely the admission of the experts' legal opinions on the

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16 Neither expert identified which of the exact provisions of the several insurance policies admitted into evidence was the source of coverage for the Car Spa Claim.

contract claim did not affect the verdict. (*Summers*, *supra*, 69 Cal.App.4th at pp. 1186-1190, applying *People v. Watson* (1956) 46 Cal.2d 818, 836, to analyze prejudice from the erroneous admission of expert opinion evidence].)[17]

Accordingly, we conclude the court erred in denying a new trial on the breach of contract claim for the Car Spa.

2. Bad Faith

As with the breach of contract claim, TIC asserts the admission of improper expert opinion evidence prejudiced the verdict on the bad faith claim. Before turning to this claim, we mention a few "bad faith" principles relevant to our discussion.

All insurance contracts contain an implied covenant of good faith and fair dealing requiring each party to the insurance contract to refrain from doing anything to injure the right of the other party to receive the benefits of the agreement. (*Egan* v. *Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 818.) When the insurer engages in unreasonable conduct in connection with an insured's insurance claim the insurer is said to have *tortiously* breached the implied covenant. (*Id.* at pp. 818-819.)

In bad faith cases, like this one, generally the focus is on whether the insurer "unreasonably withheld benefits" from the insured. Unreasonable withholding of benefits encompasses both the failure to pay full benefits due under the policy and unreasonable *delay* in payments. (*Love v. Fire Insurance* Exchange (1990) 221 Cal.App.3d 1136,1153; *Austero v. National Cas. Co.* (1978) 84 Cal.App.3d 1, 29-30 [Because the insured has contracted for timely payment of claims upon the happening of

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[17] The prejudice here is underscored by the distinct possibility the experts misinterpreted the insurance policies. Indeed, while both experts opined coverage existed for the Mack Truck and Pierto Claim, as discussed elsewhere, an independent review of the relevant policies indicates those claims were excluded under the policies. At this point, we cannot rule out the possibility the Car Spa Claim may also ultimately be found to be excluded from coverage under the policies.

the an insured event, unreasonable delay or refusal to pay a covered claim or loss deprives the insured of benefits under the contract].) In addition to delay in payments, an insured may breach the implied covenant where, for example, it fails properly to investigate the insured's claim. (*Egan v. Mutual of Omaha Insurance Co., supra,* 24 Cal.3d at p. 819). Consequently, the insurer may be liable in "bad faith" for an unreasonable delay payment or other misconduct *despite* full payment on the claim. (See *Delgado v. Heritage Life Ins.* (1984) 157 Cal.App.3d 262, 278.)

The ultimate test for "bad faith" centers on the *reasonableness* of the insurer's conduct. (*Opsal v. United Services Automobile Association* (1991) 2 Cal.App.4th 1197, 1205.) In other words, "[b]efore an insurer can be found to have acted tortiously, i.e., in bad faith, in refusing to bestow policy benefits, it must have done so 'without proper cause'." (*California Shoppers, Inc. v. Royal Globe Insurance Company* (1985) 175 Cal.App.3d 1, 54-56.) With these concepts and terms in mind, we turn to the expert evidence on the bad faith issues.

D&N proceeded to trial on its bad faith claim on the theories TIC: (1) unreasonably withheld benefits due under the policies; (2) unreasonably delayed payment on the claims and (3) failed to conduct a thorough and proper investigation of the D&N claims.

Over TIC's standing objection, the court allowed D&N's expert Hamilton to testify numerous times that TIC had committed bad faith and had breached the covenant of good faith and fair dealing. On several occasions he also explained the application of insurance regulations and stated TIC had violated insurance regulations. Hamilton also testified TIC unreasonably delayed in paying the claim on the Pump and had misinformed D&N about the claim status and salvage rights for the Pump. Hamilton also interpreted the policies and concluded that benefits had been withheld for the Car Spa Claim, and the Pierto Claim and that the Mack Truck could have and should have been adjusted under the business auto insurance policy. Finally, he opined that TIC had acted intentionally to deny and delay payments.

Five days after Hamilton testified, just before the matter was submitted to the jury, the court admonished the jury that while they should disregard Hamilton's testimony that TIC breached the covenant of good faith and fair dealing, they could consider the rest of his testimony. In our view, even assuming the court's admonition was effective, it did not go far enough.

Expert opinion evidence in bad faith case is admissible on certain factual matters such as industry standards for adjusting covered claims, the promptness of an insurer's payment on a claim and the reasonableness of an investigation. (See e.g., *Neal v. Farmers Insurance Exchange* (1978) 21 Cal.3d 910, 924; Croskey, et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group) 15:1004, pp. 15-172-15-173.) However, other matters such as whether coverage exists for certain claims, application of various insurance regulations, and whether an insurer acted with proper cause for its actions are not permissible matters for expert opinion in bad faith cases because they involve legal issues. (See *Dalrymple v. USAA* (1995) 40 Cal.App.4th 497,503; *Summers v. A.L. Gilbert Co.*, *supra*, 69 Cal.App.4th at pp. 1180-1181.)

Thus, while certain opinions Hamilton offered were not improper, others clearly exceed the proper scope of permissible expert opinion and should have been excluded. The court's admonition addressed only one aspect of the Hamilton's testimony, leaving for the jury's consideration other improper opinion evidence. Hamilton construed the insurance policy for the jury and thereafter based on his view of the contract, he concluded benefits had been improperly withheld under it. As discussed elsewhere, his interpretation of the policy was a legal matter for the court. Similarly his opinions TIC violated various insurance regulations were also improperly admitted for the jury's consideration. (*California Shoppers, Inc. v. Royal Globe Insurance Company, supra*, 175 Cal.App.3d 1, 67 ["While an expert witness may properly testify as to custom and practice [in their industry] . . . he may not state interpretations of the law, whether it be of statute, ordinance or ... regulations"].) Finally, his opinion on TIC's motives and intent in taking certain actions (i.e., whether TIC acted with "proper cause") should not have been admitted.

Finally, the likelihood of prejudice from Hamilton's testimony was real. Absent Hamilton's opinions interpreting the contract, evidence on D&N's bad faith theory relating to the *withholding of benefits* was not overwhelming. Moreover, his other improper opinions were sufficiently pervasive throughout his testimony, it would be difficult for a jury, even properly instructed, to separate the helpful and permissible opinion evidence from that which should have been excluded. The court's admonition was too little and too late. Given the totality of circumstances we cannot conclude the admission of the Hamilton's improper expert opinions on the bad faith cause of action was harmless. In sum, the court should have granted a new trial on the entire bad faith claim, not merely the issue of damages.[18]

3. **Negligence**.

As with the breach of contract and bad faith causes of action, TIC asserts improper expert testimony from D&N's expert, Richard Masters infected the negligence verdict and thus, the trial court should have granted a new trial on the issue of negligence. We agree.

D&N's negligence cause of action centered on the claim TIC was vicariously liable for Bogart's and Wood-Gutmann's unprofessional and negligent handling of D&N's insurance accounts. Masters testified as to the standard of care for an insurance broker, including a higher duty of care required by an insurance broker who acts as a specialist in a particular type of insurance. He also told the jury Bogart acted as an "agent" for both TIC and D&N and that Bogart held himself out as an "expert" in the insurance needs of concrete pumpers. Masters further opined that based on his interpretation of D&N's prior insurance policies with CBIC and TIC's policy at issue, the

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[18] Because we conclude the court should grant a new trial on bad faith (on both liability and damages), we do not reach the merits of TIC's alternative claims of error on the bad faith claim.

two policies were different in the manner in which they paid benefits for equipment claims,[19] and that Bogart's conduct fell below the standard of care when he failed to inform Navarro of the differences between the two policies. Also based on Masters' interpretation of TIC's insurance policies and the insurance proposal Bogart provided to Navarro, Masters asserted Bogart misrepresented the nature of the coverage ultimately provided under the policies. In addition, Masters opined Bogart breached the standard of care when he failed to explain how Navarro should value his equipment and that coverage would be limited to the stated values Navarro provided. Finally, the court allowed Masters to opine as to Bogart's alleged motives for offering Navarro the TIC policies.

Similar to the expert opinion evidence on the bad faith claim, certain opinions Masters offered were admissible. For example, D&N was permitted to present expert opinion evidence on the standard of care for professional insurance brokers and agents in selling insurance, as such matters would be beyond the knowledge of lay jurors. (See *Miller v. Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 702 [expert opinion evidence required when matter is beyond the common knowledge of jurors].) However, Masters' opinions went far beyond the standard of care in the insurance industry. Masters' testimony that Bogart breached the standard of care was improper opinion evidence because it was based in large part upon Masters' interpretation of TIC's insurance policies as well as CBIC's policies. As indicated elsewhere herein, the interpretation of these contracts presented a legal issue upon which expert opinion was inappropriate. In addition, Masters' opinions also invaded the province of the jury. Masters' opinion Bogart was a dual agent and held himself out as an "expert" were

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19 In Masters' view, the CBIC policy would have paid benefits up to the catastrophic limits (listed for *all* equipment) for damage to any *one* piece of equipment, irrespective of the stated value of that equipment, while TIC's policy benefits for damage to a piece of equipment was limited to the "stated value" for that piece of equipment.

contested factual determinations for the jury. Based on the other evidence presented at the trial, these matters could have been decided by the jury without the input of an expert and thus, Masters should not have been permitted to opine on them. Similarly, Masters' views about Bogart's motives and intent in recommending the TIC's policies were inadmissible because they were not relevant to the issue of negligence.

The admission of Masters' improper opinions was particularly prejudicial because in instructing the jury on the issue of negligence, the court informed the jury that they had to decide the issue based on only expert opinion; that Masters was the only expert who testified; and that Masters opined Bogart's conduct fell below the standard of care.[20] Given these instructions and without any alternative interpretation of the contracts, we do not doubt the jury relied on Masters' opinions (both proper and improper) in reaching a verdict on this issue. Consequently, TIC is entitled to a new trial on the negligence claim.[21]

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[20] The court instructed the jury: "Under the professional negligence cause of action, the standard of care of Wood-Gutmann/Bogart can only be established by expert testimony. You must determine the standard of professional learning, skill and care required of Wood-Gutmann/Bogart only from the opinions of Mr. Masters who testified as an expert witness as to such a standard." "Mr. Masters had given an opinion that Wood-Gutmann fell below the standard of care. That's the only way you can prove professional negligence is by expert testimony."

[21] In view of our conclusion, we need not reach TIC's contention that a new trial was warranted because (1) the negligence verdict was excessive; and (2) the court gave inapplicable jury instructions on a professional negligence claim. Nonetheless, because this matter will be remanded for a new trial, we briefly address TIC's arguments on the professional negligence claim as they may arise in connection with the retrial.

III. Other Contentions

TIC and D&N also raise a few additional minor matters that, notwithstanding our disposition on JNOV and new trial orders, require brief mention.

TIC correctly asserts the case proceeded to trial on the theory TIC was vicariously liable for Bogart and Wood-Gutmann's *general* negligence rather than their *professional* negligence (i.e. malpractice); at the end of the trial the court allowed D&N to assert a professional negligence theory; and the court instructed the jury on the principles of both general negligence and professional negligence. On appeal, TIC complains this was improper because: (1) it was unfairly surprised by the addition of this claim and unprepared to respond to it; and (2) as a matter of law, an insurance company cannot be held vicariously liable for an agent's professional negligence. As to TIC's first contention, we note that well before trial TIC was aware of the factual predicate for the claim, that is, Bogart held himself out as an "expert" in the field of insurance for concrete pumpers. Thus, while TIC may have been surprised the court permitted Masters to testify Bogart's expertise triggered a higher duty of care, TIC could not have been blind-sided by the notion that D&N would assert such a claim. In any event, the issue of unfair surprise is moot given that the matter will be re-tried.

As to the second argument concerning the viability of this claim, we do not agree that as a *matter of law* an insurance company can never be liable for the professional negligence of their agent or a dual agent. An agent has a general duty to use reasonable care and judgment in procuring insurance and may also assume a higher duty where, among other circumstances, an agent holds himself out as an expert in a particular area of insurance. (See *Kurtz, Richards, Wilson & Co., Inc. v. Insurance Communicators Marketing Corp.* (1993) 12 Cal.App.4th 1249, 1257.) Such duties may exist even where an agent represents both the insured and the insurer. (*Ibid.*) There is nothing in the case law or in any other authority that suggests that liability for the breach of the higher duty is always limited to the agent or that an insurer may never be vicariously liable for the conduct of its agent where the agent holds himself out as an expert or assumes additional duties to the insured. In fact, case law suggests liability of an insurer may be found in certain circumstances, where for example, the insurer also holds itself out as an expert in a particular area of insurance (*Kurtz, Richards, Wilson & Co., Inc. v. Insurance Communicators Marketing Corp, supra,* 12 Cal.App.4th at p. 1258) or where the insurer acts to ratify the agent's conduct. (See *Shultz Steel Company v. Hartford Accident & Indemnity Company* (1986) 187 Cal.App.3d 513, 523.)

A. Discovery

In ordering a new trial on bad faith and breach of contract damages, the trial court ordered discovery re-opened solely on the issue of the attorney fees D&N incurred in connection with the bad faith claim. This order is too narrow. After reversal upon appeal discovery is automatically re-opened *on all issues* until 15 days before the date initially set for the new trial in the action. (*Fairmont Insurance Company v. Superior Court (Stendell)* (2000) 22 Cal.4th 245, 253.) As the Supreme Court observed: "In a typical case, when a new trial is required, the nature and scope of the issues will have been affected, requiring substantial investigation of new points or issues that were not adequately addressed in the original proceedings. The parties are afforded a trial de novo, along with ''the right to introduce any evidence introduced at the prior trial, but also any additional and new evidence.'' [Citation.]" (*Ibid.*)

B. Attorney Fees Claim

D&N asserts the trial court erred when it precluded it from presenting evidence of attorney fees it sought in connection with the bad faith claim. In our view the court did not abuse its discretion in excluding this evidence because: (1) D&N had asserted the evidence was privileged during discovery and did produce it until shortly before trial began notwithstanding earlier TIC's request for it during discovery (*Xebec Development Partners, Ltd v. National Union Fire Ins.* (1993) 12 Cal.App.4th 501, 569); and (2) in offering the evidence D&N failed to comply with a local rule of court.

In any event, given TIC now has access to fees evidence any claim of unfairness and prejudice is now resolved. Thus, on re-trial D&N may seek to recover fees so long as the evidence supporting the fees claims is timely produced during the new discovery period, the evidence is otherwise admissible, and D&N complies with the local rules of court. (*Ibid.*)

DISPOSITION

The judgment is reversed, in part and affirmed in part. Specifically, the court's order granting the JNOV on the breach of contract claim for the Mack truck is affirmed. The judgment is reversed in all other respects and remanded for further proceedings. On remand, the trial court is directed to: (1) vacate its order denying the JNOV on the breach of contract cause of action for the Pierto Construction claim and to enter a new and different order granting the JNOV on the this claim; (2) vacate its order granting a new trial solely on the issue of damages on the breach of contract and breach of the covenant of good faith and fair dealing causes of action; (3) vacate its order denying a new trial on the negligence cause of action; and (4) enter a new and different order granting a new trial on negligence, bad faith and breach of contract for the Car Spa Claim and reopening discovery on these claims. Each party shall pay its own costs on appeal and cross-appeal.

WOODS, J.

We concur:

PERLUSS, P.J.

JOHNSON, J.